

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 96I-33
 62250

In the Matter of the)	WT DOCKET NO. 95-11
Application of)	
)	
HERBERT L. SCHOENBOHM)	
Kingshill, Virgin Islands)	
)	
For Amateur Station and)	
Operator Licenses)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1996 ; Released: September 27, 1996

By the General Counsel:

1. The application of Herbert L. Schoenbohm to renew his amateur licenses was denied by the Administrative Law Judge because "the Commission will not be able to rely upon him to be truthful or to comply with the Communications Act and Commission rules and policies." Initial Decision of Administrative Law Judge Edward Luton, 11 FCC Rcd 1146, 1149 (1996). I.D. paras. 26-27. A review of the present record, the exceptions, briefs, and reply reveals that the original issues designated for hearing have been overshadowed by the more basic question of whether the applicant was completely candid in his testimony in this case. Regarding this matter there are inconsistencies, and discrepancies in the record, partially attributable to the fact that several critical questions were not raised by the Bureau until its proposed findings. Additionally, an evidentiary gap exists because another fundamental issue was also never designated for hearing or responded to on the record. Accordingly, pursuant to 47 C.F.R. § 0.251(c), as amended,¹ this proceeding will be remanded to the ALJ for taking of further evidence on the issues set out below.

BACKGROUND

2. Schoenbohm was convicted for fraudulently using a counterfeit access device to obtain long distance telephone service in violation of federal law, 18 USC § 1029(a)(1). In affirming his conviction, the United States Court of Appeals for the Third Circuit, in a Memorandum Opinion, at p.6, Bureau Ex. 1, observed that Section 1029(a)(1) was violated if Schoenbohm made a single call using a counterfeit access device, here "illicitly-obtained access codes." It concluded that "overwhelming evidence" supported the conviction. Id., p.9. The court

¹ See Amendment of Section 0.251 of the Commission's Rules Concerning Authority Delegated to the General Counsel, 11 FCC Rcd 6338 (1996).

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summarized the evidence:

Two witnesses testified that Schoenbohm telephoned them at about the same time that records show calls being placed to their numbers with illicit codes. Five other witnesses to whom calls were placed with illicit codes testified that Schoenbohm was the only person in the Virgin Islands who ever telephoned them. Schoenbohm possessed an automatic dialing device that could be used break into the CALLS telephone line. A Secret Service agent testified that Schoenbohm admitted possessing access codes and asked "to cut a deal" to avoid losing his job with the Virgin Islands Police Department. Another witness testified that he heard Schoenbohm broadcast on ham radio about how to obtain illicit access codes.

Id. pp. 6-7 (emphasis added).

3. By Amended Hearing Designation Order, 10 FCC Rcd 1669 (Wireless Bureau 1995), a hearing was ordered by the Bureau to determine whether in light of his prior conviction "Schoenbohm is qualified to renew his amateur service licenses." A second issue was added by the ALJ during the prehearing stage of the case when the Bureau made a substantial showing that in an amateur radio communication on April 3, 1995, Schoenbohm had stated that because of the FCC ex parte rules he was not permitted to request political intervention in his case; however, he also said that other persons could make such requests on his behalf and he provided the name, address, and telephone number of his local Congressman. By Order, FCC 95M-136, June 8, 1995, the presiding ALJ added issues to determine if "Schoenbohm violated Section 1.1210 of the Commission's rules ... by soliciting or encouraging others to make a presentation that he was prohibited from making," and if so, "the effect of such a violation on his qualifications to renew his amateur licenses."

4. After the hearing the ALJ resolved both issues against the applicant concluding that the Commission will not be able to rely on Schoenbohm "to be truthful" or to comply with the applicable legal requirements. I.D. paras. 26 and 27. The ALJ concluded that "Neither extenuation or mitigation will be found." I.D. para. 21. Central to his decision was his conclusions about the applicant's lack of truthfulness in the present proceeding. Thus, the ALJ found that in his written and oral testimony, and reiterated in his proposed findings, Schoenbohm altered his initial written testimony in "a conscious effort to influence and mislead the trier of fact. That testimony sought to portray a softened, more benign, image of the facts underlying the felony conviction and was false." Id. In essence, the ALJ held that Schoenbohm's testimony about his conviction "was deliberately false." Id.

5. On the ex parte issue the ALJ did not credit Schoenbohm's explanation that he was only discussing his "newly acquired knowledge" of the ex parte rules, and not soliciting prohibited communications. A transcript of the communications established, the ALJ found, that:

(a) Schoenbohm, after stating that he could not request "political intervention," provided the name, address, and telephone number of his local Congressman; and (b) later went on to make specific suggestions about the content of the letters to be written to Congressmen on his behalf. Thus, the ALJ concluded that "Schoenbohm solicited others to make prohibited ex parte presentations in his behalf in this proceeding. The plain meaning of the words [he] used leave no real doubt about the matter." I.D. pars. 23-25.

6. Schoenbohm's exceptions and brief urge, among other things, that the ALJ erred in finding that he "was guilty of lack of candor" in testifying about his prior felony conviction. Br. pp. 4-6, 17-18. In his exceptions Schoenbohm argues that this lack of candor finding "may well have resulted" from the ALJ's failure to fully understand the relevant criminal provisions, and that the questions and answers at the hearing were designed "to establish truthfully that Schoenbohm did not produce or possess any counterfeit credit cards, plates, or other electronic apparatus, . . . useful to make calls without paying for them." Id. p. 18. Second, the ALJ's failure to fully quote the definition of "access device" and his ignoring of subsections 1029(a)(3)-(a)(6), "may well have resulted in his failure to understand that Schoenbohm's testimony was not intended to deny what he had already admitted in writing. . . ." Br. pp. 6-7. Schoenbohm concludes that: "It was certainly not lack of candor for [Schoenbohm] to explain at hearing that it was only codes in his mind that he had used and not physical apparatus. After all, if Schoenbohm had been engaged in the manufacture or production of counterfeit credit cards or other counterfeit hardware, or if he had sold such materials to others, it would be a much more serious matter." Br. p. 18.

7. On the other hand, the Bureau responds that these statutory provisions now cited and the arguments based thereon were never raised before the ALJ, even though it had urged in its proposed findings that Schoenbohm had "mischaracterized his conviction." Reply, pp. 9-10. According to the Bureau, there was no reason for the ALJ to consider subsections 1029(a)(3)-(a)(6) because Schoenbohm was not convicted of violating those subsections, and the definition of "access device" used by the ALJ, "includes both tangible (such as a card, plate or mechanical device) and intangible (such as a memorized number) access devices -- which appears to be the distinction that Schoenbohm claims he was trying to make." Id. The Bureau also urges that there is ample evidence in the record that Schoenbohm also testified untruthfully and "incredibly about his solicitation of ex parte presentation . . . and about his pension rights" Reply, pp. 10-11.

DISCUSSION

8. This case was originally designated for hearing because the applicant's felony conviction involving telephone toll fraud raised a question about whether the applicant could be relied upon to be completely candid with the Commission and to comply with the relevant legal requirements. The ALJ then added a second issue regarding possible violations of the ex parte rules. The original issues designated for hearing have now been overshadowed by two more basic issues about "the applicant's forthrightness and truthfulness in the very Commission proceeding in which the applicant's propensity for truthfulness is to be assessed," I.D. para. 21, and whether "Schoenbohm broadcast on [amateur] radio about how to obtain illicit access codes." See para. 13, below.

9. First, as the Bureau notes, the ALJ did find that the applicant made "an effort to mislead the trier of fact" and that his testimony about the prior conviction "was deliberately false." However, Schoenbohm was not disqualified based on this finding of lack of candor by the ALJ, even though the Commission has consistently held that it has a right to expect complete candor from all its applicants in their testimony. See, e.g., William M. Rogers, 92 FCC 2d 187, 189 (1982), and Richardson Broadcast Group, 7 FCC Rcd 1583 (1992), recon. denied sub nom. Elizabeth M. Younts, 8 FCC Rcd 1583 (1993), aff'd by judgment, 995 F.2d 306 (1993). A comparison of Schoenbohm's testimony about his felony conviction, and the court's summary of the evidence reveals several unexplained discrepancies. For example, Schoenbohm testified that the counterfeit access device he was convicted of possessing "was never described fully in the court, but believed to be numbers in my mind." Tr. 38. In fact, the court made at least four references to "illicitly obtained access codes," and at least three references to evidence of their use, the gravamen of the crime. At the hearing Schoenbohm was not confronted with these inconsistencies and asked to reconcile the differences. Not until its proposed findings did the Bureau assert that Schoenbohm had "mischaracterized his conviction." Schoenbohm also testified that he was convicted "solely of having knowledge in my mind of certain telephone codes." S. Ex. 7, p.2. However, the court found that the testimony of seven witnesses established that the illicit codes had been used, and that "Schoenbohm possessed an automatic dialing device that could be used to break into the Calls [carriers] telephone line." Again Schoenbohm was not confronted with the court's findings and asked to explain. Similarly, Schoenbohm never made his present argument about the different criminal provisions (para. 7, above) during the hearing so that the ALJ was not afforded an opportunity to consider the argument in his Initial Decision.

10. Second, the Bureau argues that Schoenbohm's testimony about the ex parte violation was incredible and lacked candor. On this point the ALJ did find that Schoenbohm's testimony that he was not soliciting political intervention but only discussing his newly acquired knowledge of the FCC's ex parte rules could not be reconciled with the "plain meaning of the words" Schoenbohm had used, which "leave no real doubt" that he "solicited others to make prohibited ex parte presentations in his behalf in this proceeding." Both the ALJ and the Bureau rely on a transcript of the amateur communications (S. Ex. 3) which establishes that Schoenbohm: (a) provided the name, address, and telephone number of his local Congressman, and (b) made specific suggestions about the content of the letters which should be written to Congressmen on

his behalf. At the hearing Schoenbohm was not confronted with these prior statements, and thus did not have an opportunity to square them with his testimony. Again, the Bureau did not raise these matters until its proposed findings, paras. 16, and 25.

11. Third, the Bureau urges that Schoenbohm's testimony, claiming that as a result of the conviction he had lost \$150,000 in pension rights, was incredible and untruthful because of his inability on cross examination to provide details about his pension rights. On this point the Bureau did cross examine Schoenbohm at the hearing, Tr. pp. 66-68, and did raise the matter in its proposed findings, at paras. 7, 8, and 25; however, the ALJ made no findings in this regard.

12. Review of the record also reveals another troublesome evidentiary gap which apparently was never noticed or addressed in the proceedings below. In its summary of the evidence the court stated that a witness at the felony trial had testified that "he heard Schoenbohm broadcast on ham radio about how to obtain illicit access codes." See para. 2, above. This finding by the court raises a substantial and material question of primary concern to the Commission, *i.e.*, whether Schoenbohm's amateur facilities were used in connection with his criminal activities. This unanswered question and the other discrepancies previously mentioned, all relevant to the applicant's qualifications, can best be resolved by enlarging the designated issues, and remanding the case for a further hearing.

CONCLUSION


13. We agree with the Bureau that the Communications Act of 1934, as amended, 47 USC § 309(e), imposes upon the applicant the burden of proving that this application should be granted. However, the Commission has indicated that it does not lightly impose its most severe sanction, denial of a single application, "where conflicts and gaps in the record make it impossible to resolve" a case with "sufficient certitude" about an applicant's qualifications. Telestar, Inc., 2 FCC Rcd 7352, 7353 and 7356 (1987)(subsequent history omitted). Therefore, this proceeding will be remanded to the ALJ for taking further evidence and, if necessary, to provide demeanor findings to support any credibility findings. Id. at 7356. Of course, the burden of proceeding with the introduction of evidence and the ultimate burden of proof remain with the applicant to satisfy all the issues designated in this case.

14. ACCORDINGLY IT IS ORDERED, That, pursuant to the authority delegated under 47 C.F.R. § 0.251(c), as amended, the issues in this proceeding are enlarged:

- (c)(1) To determine whether Herbert L. Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction, loss of pension rights, and ex parte communications;
- (c)(2) To determine if Herbert L. Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes.

15. IT IS FURTHER ORDERED, That Schoenbohm's Exceptions and Brief in Support of Exceptions filed February 26, 1996 ARE GRANTED to the extent reflected herein and ARE DISMISSED in all other respects and Schoenbohm's Motions for Leave to Supplement Exceptions filed April 15, and 26, 1996 ARE DISMISSED as moot.

16. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Administrative Law Judge for further proceedings consistent with this Memorandum Opinion and Order.

A handwritten signature in black ink, appearing to read "William E. Kennard", with a stylized flourish at the end.

William E. Kennard
General Counsel